United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

307

BRIEF FOR APPELLANT THOMAS B. JOHNSON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1120

United States of America, Appellee

v.

Thomas B. Johnson, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Is evidence that appellant was seen loading a pistol and walking in a direction toward and subsequently from the place where the deceased was shot sufficient to sustain a conviction for second degree murder where there is no proof that appellant had a motive for killing the deceased?

2. Should the trial court have instructed the jury on its own motion as to the elements of manslaughter where the evidence was consistent with an inference that appellant acted without malice and there was minimal evidence, if any, of ill-will or animosity between appellant and the deceased prior to the shooting?

3. Should appellant's conviction for second degree murder be affirmed where the jury could have inferred that appellant willfully shot the deceased under mitigating circumstances but the trial court's instructions on malice did not make clear that an act done intentionally or willfully is not necessarily done with malice?

This case has never been before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 1258-70

United States of America, Appellee

v.

Thomas B. Johnson, Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

REFERENCES TO RULINGS

The following rulings and instructions issued by Judge Howard Corcoran during appellant's trial are presented for review by this Court:

(1) Denial of appellant's motion for judgment of acquittal issued November 13, 1970 (Tr. II, 205).

(2) Ruling to not instruct jury as to elements of manslaughter issued November 16, 1970 (Tr. III, 222).

(3) Instructions pertaining to malice given November 16, 1970 (Tr. III, 273-277) and November 17, 1970 (Tr. IV, 291-296).

JURISDICTIONAL STATEMENT

Appellant Thomas B. Johnson was indicted on two counts, one a charge of murder in the first degree, D.C. Code § 22-2401 (1967), and the other a charge of carrying a dangerous weapon, D.C. Code § 22-3204 (1967). On pleading not guilty, appellant was tried before a jury in the United States District Court for the District of Columbia. Appellant was found guilty of the lesser included offense of murder in the second degree, D.C. Code § 22-2403 (1967), and of carrying a dangerous weapon and was sentenced to imprisonment for a term of five to twenty years as to second degree murder and one year as to carrying a dangerous weapon, the sentences to run concurrently. Timely notice of appeal was filed.

The District Court had jurisdiction pursuant to the Act of December 23, 1963, 77 Stat. 482, D.C. Code § 11-521 (1967). This Court has jurisdiction of the appeal pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended, 28 U.S.C. §§ 1291, 1294 (1964).

STATEMENT OF FACTS

On the afternoon of May 30, 1970, John H. Duvall was found dead in his apartment at 1110-1/2 U Street, Northwest. Death had been caused by a gunshot wound in the head (Tr. I, 16). The deceased's body was found in the bathroom, which faced the door to the apartment (Tr. II, 112). An empty wallet was found near the body of the deceased along with 71 cents in change (Tr. II, 104-105).

At the trial of appellant, both appellant and witnesses for the Government testified that appellant had been playing a dice game with the deceased and others during the afternoon of May 30 (Tr. III, 214). Appellant lost all of his money, approximately $80 (Tr. III, 215), to the deceased (Tr. III, 218). At that point appellant asked the deceased for a loan, which the deceased refused. Appellant then took approximately $90 out of the hand of the deceased and left the apartment (Tr. III, 220-221). (See also testimony of Rollins Moody, Tr. II, 80-81; William Laney, Tr. II, 141; and

John Scott, Tr. II, 170.) A witness for the Government, John Scott, testified that money is often taken out of another's hands on such occasions and that at the time the deceased did not appear particularly angry (Tr. II, 187).

Shortly after appellant departed, two other persons left the deceased's apartment, Rollins Moody (Tr. II, 81) and John Scott (Tr. II, 170), and a third person, Calvin Stoddard, came into the apartment (Tr. II, 122-123).[1/] At this time three persons were present in addition to the deceased: William Laney, Calvin Stoddard, and Norman Smith who did not testify. There is some conflict in the testimony of Laney and Stoddard relating to the ensuing events. Stoddard testified that when he came into the apartment the deceased was standing at the top of the stairway near the door to the apartment (Tr. II, 122-123).[2/] A few minutes later Stoddard heard someone come into the apartment (Tr. II, 124). There was a

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1/ There is some inconsistency in the record on this point as none of the other persons who testified to witnessing the money-snatching incident recalled seeing John Scott in the apartment at that time. (See testimony of Rollins Moody, Tr. II, 78-79 and William Laney, Tr. II, 139 and compare testimony of Calvin Stoddard, Tr. II, 129, with that of John Scott, Tr. II, 190.)

2/ Stoddard's testimony on this point is confirmed by the testimony of Rollins Moody, who stated that when he left the apartment the deceased was standing at the top of the stairs (Tr. II, 81).

conversation at the doorway which could not be heard because of the noise made by a fan between Stoddard and Laney (Tr. II, 131). Stoddard heard the deceased shout "That's mine" (Tr. II, 124, 132), and then heard two shots fired (Tr. II, 124).

William Laney testified that after appellant left the apartment, he left to go to the liquor store and returned to find the deceased seated in the back room of the apartment where the gambling took place (Tr. II, 145-146). Laney stated that a knock was heard at the apartment door, that the deceased went to the door, and that there was a short conversation during which someone said, "You don't believe I'll shoot, do you?" (Tr. II, 142, 148). He then heard a shot or two fired (Tr. II, 142). Laney testified initially that the voice he heard sounded like appellant's (Tr. II, 142), but subsequently he stated that he had just assumed it was appellant's voice when interrogated by the police (Tr. II, 154).

John Scott testified that three or four minutes after appellant left the apartment he followed him out (Tr. II, 170) in order to get money from him (Tr. II, 188). Scott stated that he went to the corner of 12th and U Streets, Northwest and then turned down 12th Street where he came upon appellant standing by the trunk of his car (Tr. II, 170-171). Scott asked appellant for some

money but appellant refused stating that he had "bills" (Tr. II, 171-172). Scott testified that appellant had a revolver in his hand and was loading it and that appellant placed the pistol in his pocket and walked up 12th Street (Tr. II, 172-173). According to Scott, appellant walked to the corner of 12th and U Streets and turned right in the direction of the deceased's apartment (Tr. II, 173-174). However, on cross-examination Scott stated that appellant might have turned right to go into the liquor store at the corner (Tr. II, 191-192).[3/] Scott testified further that ten or fifteen minutes later he saw appellant walking towards his car through a parking lot located behind a group of buildings which included the building in which appellant's apartment was located (Tr. II, 174-175).

Scott returned to the deceased's apartment and found the deceased's body in the bathroom (Tr. II, 177). Scott went through the deceased's wallet for the purpose of finding a telephone number in order to call the deceased's wife (Tr. II, 185-186). On cross-examination, Scott conceded that he was currently charged with a narcotics violation (Tr. II, 179) and that on May 30 he had been drinking wine,

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3/ At the preliminary hearing Scott had stated that he had not seen appellant turn the corner to go toward the deceased's apartment (Tr. II, 192).

beer, whiskey and gin since 11:00 or 12:00 o'clock in the morning (Tr. II, 183-184). Further, Scott was unable to identify appellant at the trial until he walked up to the table where appellant was seated (Tr. II, 164; III, 244).

Appellant took the stand and testified that after taking money from the deceased and leaving the apartment, he went either to a poolroom or a liquor store and then went to his car and drove home (Tr. III, 212-213).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2401, provides, in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, . . . of deliberate and premeditated malice . . . is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Rule 52(b). Plain Error.

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. Appellant's conviction for second degree murder should be reversed because the evidence, viewed in the

light most favorable to the Government, was not sufficient for a reasonable juror to conclude beyond a reasonable doubt that appellant shot the deceased.

2. The trial court's failure to instruct the jury as to the elements of manslaughter was plain error requiring reversal of appellant's conviction for second degree murder since on the basis of the evidence the jury could have inferred that appellant acted without malice.

3. Appellant's conviction for second degree murder should be reversed because the instructions to the jury, in failing to distinguish an act done intentionally or willfully from an act done with malice, could have affected the jury's verdict.

SUMMARY OF ARGUMENT

There was insufficient evidence before the jury to sustain the verdict of guilty of second degree murder. There was no proof that appellant had any motive for killing the deceased. The Government's principal evidence was the testimony that appellant loaded his pistol and went in a direction which could be taken to go to the deceased's apartment and then subsequently came in a direction from the deceased's apartment at approximately the time the deceased was shot. This evidence was not sufficient to remove all reasonable doubt as to whether appellant was the person who shot the deceased.

In addition, error was committed in that the trial court failed to instruct the jury on the elements of manslaughter. Evidence of the circumstances of the killing in the instant case would be consistent with a jury finding that appellant, assuming he shot the deceased, acted without malice. Under such circumstances instructions on manslaughter are required. See United States v. Comer, 137 U.S.App.D.C. 214, 451 F.2d 1149 (1970). Counsel's failure to request such instructions at appellant's trial does not preclude this Court from reversing the judgment, inasmuch as the trial court's failure to give the instructions on its own motion constituted plain error. See Thomas v. United States, 136 U.S. App.D.C. 222, 419 F.2d 1203 (1969).

Finally, the instructions of the trial court on malice failed to make clear that a wrongful act intentionally or willfully done is not necessarily done with malice. Since there was little positive evidence of malice, the jury's verdict could have been swayed by the court's instructional error and therefore reversal of the judgment is necessary. United States v. Wharton, ___ U.S.App.D.C. ___, 433 F.2d 451 (1970).

I. WITH RESPECT TO THE CHARGE OF MURDER THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY

At the close of the Government's case the trial court denied appellant's motion for judgment of acquittal (Tr. II, 205). This motion should have been granted with respect to the charge of murder. On the basis of the evidence introduced by the Government, the jury could not have properly concluded that appellant was guilty of that crime. As stated in Austin v. United States, 127 U.S.App.D.C. 180, 189, 382 F.2d 129, 138 (1967) (footnote omitted):

> [a] motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime.

To reach a verdict of guilty of second degree murder, the jury had to find that appellant shot the deceased with malice. The jury could have inferred the presence of malice from the use of a deadly weapon. However, on the basis of the evidence viewed in light most favorable to the Government, a reasonable juror would necessarily have a reasonable doubt as to whether appellant was the person who shot the deceased.

The Government attempted to prove by means of the testimony of William Laney that appellant shot the deceased. Laney testified that he heard the words--"You don't believe I'll shoot, do you?"--spoken prior to the shooting of the deceased and that the voice of the person who spoke these words sounded like appellant's (Tr. II, 142). However, on cross-examination Laney stated that he could not swear that it was appellant's voice and that it could very possibly have been the voice of someone else (Tr. II, 150-151). Further, on redirect examination the witness retracted his earlier testimony (Tr. II, 154) (emphasis added):

> Q. What was it about the voice that made you conclude that it sounded like his voice?
>
> A. Maybe it's because of what had happened, maybe I assumed that it was his voice -- what had previously happened. Therefore, when the police, as I say, caught up with me and brought me down here to interrogate me, in addition to other people talking, and what had happened, I merely made up my mind, I just assumed that I heard his voice.

The jury could not logically choose to accept the purported voice identification but reject the witness's subsequent retraction. Thus on the basis of Laney's testimony, the jury could not properly conclude that appellant shot the deceased.

Circumstantial evidence which might have warranted the inference that the deceased was killed by appellant

would have been proof of a motive. The Government was unable to furnish such proof. In closing argument the U. S. Attorney attempted to construct a motive for the killing by suggesting that appellant needed money and came back to take more from the deceased (Tr. III, 231-233). Such a theory is almost beyond credulity. Since appellant left the apartment after the dice game with more money than when he arrived, it is highly unlikely that he would go back to steal more, especially since appellant knew the deceased was not alone. It is far more likely that appellant went back to the deceased's apartment to try to obtain the deceased's consent to appellant's borrowing a portion of the money he lost. The Government placed much emphasis on John Scott's testimony that appellant stated that he needed money to pay his bills (Tr. II, 171; Tr. III, 231-232). Whether true or not, the statement was made to resist Scott's request for money and should not be viewed as evidence of anything more. The Government also emphasized that the police found only a small amount of money on the body of the deceased despite evidence that the deceased had won during the day amounts substantially in excess of the money which appellant had taken from the deceased (Tr. III, 227-228). However, several explanations might account for the police finding no money on the person of the deceased. The deceased may not have kept all of the

money he won in his immediate possession. If he had, there was opportunity for others, especially John Scott, who testified that he went through the deceased's wallet (Tr. II, 177-178), to have taken the money prior to the arrival of the police.

Nor can a rational motive be constructed from appellant's taking money out of the hand of the deceased. Appellant testified that he grabbed the money because of an "understanding" he had with the deceased (Tr. III, 212). The Government's witness, John Scott, testified that money is frequently snatched from another's hands during such occasions and that at the time the deceased did not seem particularly angry (Tr. II, 187). If ill-will or anger which might be a motive for murder is to be inferred from this episode, it would be more logical to assume ill-will on the part of the deceased toward appellant because of his grabbing the money rather than to assume ill-will on appellant's part because he lost money which the deceased did not voluntarily lend back to him. In effect, the Government failed to prove any rational motive that appellant might have had for killing the deceased. This constituted a significant gap in the evidence necessary to permit the jury to determine that appellant was the person who shot the deceased.

The only other evidence introduced by the Government bearing on the issue of who shot the deceased was

in the testimony of John Scott. Scott testified (1) that he saw appellant loading a pistol after appellant left the deceased's apartment (Tr. II, 172), (2) that he then saw appellant walk in a direction which would be taken in order to proceed to the deceased's apartment (Tr. II, 173-174), and (3) that 10 or 15 minutes later he saw appellant coming in a direction from the deceased's apartment (Tr. II, 174-175). From testimony of other witnesses the jury could have surmised that the deceased was shot during the 10 or 15 minute period between the time appellant was seen heading in the direction of the deceased's apartment and subsequently seen coming in a direction from the apartment.

The testimony of John Scott would permit the jury to conclude that appellant had the means and opportunity to have killed the deceased. However, the testimony would not justify the conclusion that appellant did shoot the deceased. The record indicates that many persons were in the area of the deceased's apartment at the time of the killing (Tr. II, 90). In view of the large number of small firearms in the District of Columbia,[4/] it is certainly possible that some of these persons were carrying revolvers. Thus, it would be reasonable to assume that persons other than appellant also had the means and opportunity

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4/ Hearings on Fed. Firearms Act Before the Subcomm. on Juvenile Delinquency of the Sen. Comm. on the Judiciary, 89th Cong., 1st Sess., [redacted] 290 (1965).

to have killed the deceased. Certainly, the fact that appellant was seen loading his pistol shortly after grabbing money from the deceased and prior to the time the deceased was shot is incriminating. But it does not remove all reasonable doubt as to whether he shot the deceased. Appellant's loading and carrying a pistol after leaving the deceased's apartment does not have to be viewed in relation to the events occurring previously in the apartment. Appellant's decision to load and carry his pistol may have been related to an earlier decision which resulted in his having the pistol in his automobile. If appellant had decided to carry a loaded pistol on that day but had not taken it into the deceased's apartment, then his loading and carrying the pistol after leaving the apartment would be totally unrelated to events occurring in the apartment and would have little probative value in relation to the question of whether appellant shot the deceased.

Thus, in the absence of a positive voice identification and of proof of motive, evidence that appellant loaded his pistol and went in the direction of the deceased's apartment is not sufficient for a reasonable juror to conclude beyond a reasonable doubt that the appellant was the person who shot the deceased. Accordingly, the trial court committed error in submitting the charge of murder to the jury for determination.

II. THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON THE ELEMENTS OF MANSLAUGHTER WAS PLAIN ERROR IN VIEW OF THE EVIDENCE AND PERMISSIBLE INFERENCES THEREFROM

At the close of appellant's case, the following colloquy occurred between the trial court and counsel for appellant (Tr. III, 222):

> THE COURT: * * * As the evidence lines up now, I cannot see going to the jury on anything except first degree and second degree murder.
>
> MR. J. MURRAY: The defense would agree.
>
> THE COURT: I think manslaughter is out.
>
> MR. B. MURRAY: We cannot suggest any basis for a manslaughter charge.

Despite counsels' concurrence with the court's position, it was plain error for the court to not instruct the jury on the elements of manslaughter.

It is well established that in a prosecution for murder an instruction on manslaughter as a lesser included offense is required if there is any evidence, however weak, tending to bear on the issue of manslaughter. Stevenson v. United States, 162 U.S. 313, 315, 323 (1896); see Belton v. United States, 127 U.S.App.D.C. 201, 206, 382 F.2d 150, 155 (1967); United States v. Huff, No. 22,793 (D.C.Cir. March 8, 1971). If a reasonable inference from the facts in evidence would be consistent with the lesser offense of manslaughter, the instruction

should be given. United States v. Comer, 137 U.S.App. D.C. 214, 421 F.2d 1149 (1970). As this Court stated in Comer, 137 U.S.App.D.C. at 219, 421 F.2d at 1154 (emphasis added):

> . . . the court must appraise all the testimony and evidence to determine whether it is capable of more than one reasonable inference. Thus in a manslaughter case such as the present one, the inquiry is whether the evidence bearing on malice was so compelling and unequivocal on the issue that a jury finding of no malice would be irrational.

In this case the evidence permits the inference that appellant, assuming he shot the deceased, acted without the prerequisite malice which would warrant his conviction for murder. The only evidence pertaining to the shooting of the deceased was that a person fired two shots, one of which killed the deceased, while the deceased was standing in or near the entrance to his apartment and that immediately before the shots were fired a short conversation occurred between the deceased and the person who shot him. The fact that there was a conversation, one in which some shouting occurred, makes it reasonable to assume that something occurred during the confrontation between the deceased and appellant which led to the killing.

If appellant had formulated a design to kill prior to returning to the deceased's apartment, it is unlikely

that he would have engaged in a conversation with the deceased before shooting him, especially since other people were in the apartment. While appellant's leaving the apartment, loading his pistol, and returning to the apartment might be viewed as evidence of a design to kill formed before returning to the apartment, this interpretation was not accepted by the jury. If the jury had inferred a premeditated intent to kill from these events, then it should have returned a verdict of guilty of murder in the first degree. Having rejected this inference, the jury must have inferred that events occurred at the doorway of the deceased's apartment which resulted in appellant's shooting the deceased.

Such events could be consistent with an absence of malice on appellant's part as well as with the presence of malice. In the conversation which occurred prior to the shooting, the deceased was heard to have shouted "That's mine" (Tr. II, 124 and 132) and the person who shot him was heard to state "You don't believe I'll shoot, do you?" (Tr. II, 142). The jury could have concluded that the words "That's mine" were spoken in reference to the money appellant had snatched from the deceased, that the deceased was attempting to grab the money back from appellant, that appellant threatened to shoot the deceased if the deceased tried to take the money from him, and that appellant then fired two shots

either intending to hit the deceased or intending to frighten him, but killing him inadvertently. In effect, the jury might have believed that appellant, perhaps under the influence of alcohol (Tr. III, 212), was acting in fear of bodily injury and in the heat of this passion was provoked into shooting the deceased. If the jury considered such provocation adequate, then it would have been entitled to return a verdict of guilty of voluntary manslaughter. Kinard v. United States, 68 App.D.C. 250, 96 F.2d 522 (1938). Or, the jury might have believed that the appellant did not intend to shoot the deceased but fired the pistol to frighten the deceased with such recklessness involving extreme danger of death to warrant a verdict of guilty of involuntary manslaughter. See United States v. Dixon, 135 U.S.App.D.C. 401, 419 F.2d 288 (1967) (concurring opinion of Judge Leventhal).

While certain inferences may be drawn from the words exchanged between the deceased and the person who shot him, the instant case is essentially one in which the precise circumstances of the killing are unknown. Such a lack of evidence is pertinent as to whether instructions on manslaughter should be given. In State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959), where it was held that error was committed when no instructions on manslaughter were given, the court stated, 110 S.E.2d at 477:

> . . . [T]his Court is of opinion that the fact that defendant and his wife were together in the woods 10 minutes . . ., as the State's evidence tends to show, before any shots were heard is a circumstance that requires a charge on manslaughter.
>
> The evidence discloses that there were no eye witnesses to the shooting, and no one of the State's witnesses knows what actually took place on this occasion. It rests in speculation.

See also Harris v. Commonwealth, 389 S.W.2d 907 (Ky. 1965) (where the court reversed a conviction for murder because of the failure of the trial court to instruct on voluntary manslaughter even though the only evidence of the killing was the testimony of a witness who saw only the defendant stab the deceased, the court stating that it could have been inferred that the striking had been preceded by a verbal or physical exchange before the witness arrived). The instant case is similar to Comer, supra, where the Court stated, 137 U.S.App.D.C. at 220, 421 F.2d at 1155:

> We simply do not know what happened in the Comers' apartment. And the evidence in the record supports a construction of events which would justify a finding of killing without malice at least as well as it supports a finding of a killing with malice.

While a jury could reasonably infer from the evidence in the instant case that appellant acted without malice, a critical feature of the case was the Government's failure to prove a motive for the killing. The Government argued that the reason for the killing was that appellant needed money and came back to take more from the deceased

(Tr. III, 231-233). As more fully discussed in Part I, supra, this theory has little foundation in the evidence and is logically unsound in view of the fact that after the dice game appellant left the deceased's apartment with more money than he had when he arrived. In addition, evidence of any malice on the part of appellant is weak, if not non-existent. There is nothing in the record which would indicate any animosity or ill-will between appellant and the deceased prior to the day of the homicide. As set forth in Part I, supra, appellant's taking money out of the hand of the deceased does not demonstrate ill-will. In all probability the jury inferred malice because it believed appellant shot the deceased and was given no alternative to find that appellant shot the deceased without malice.

The absence of any showing of ill-will has been a factor which courts have emphasized in reversing convictions for murder where instructions on manslaughter were omitted. In Commonwealth v. McCauley, 355 Mass. 554, 246 N.E.2d 425 (1969), where the defendant had been convicted of second degree murder, the court held that it was reversible error to withdraw the issue of involuntary manslaughter from the jury. In that case, there was testimony that the defendant was in the apartment of one William Sullivan along with Sullivan and two other persons; that the defendant picked up Sullivan's

automatic pistol, pointed it at Sullivan, and pulled the trigger (the pistol being loaded but not firing); and that the defendant subsequently loaded, aimed and fired the pistol killing the deceased. The defendant had not known the deceased prior to that day, and there was no evidence of any unpleasantness or anger prior to the shooting. The Supreme Judicial Court of Massachusetts stated that the homicide could have been unintentional as the jury might have believed the defendant was unfamiliar with the use of the weapon and did not intend to discharge it. As bearing upon whether the homicide was intentional, the court stated that the jury could consider the nature of the acquaintance of the persons present, the fact that they met fortuitously before the shooting, the relationship of amiability to the time of the shooting, and the absence of any reason for hostility between the defendant and the deceased.

Similarly, in Stanley v. Commonwealth, 380 S.W.2d 71 (Ky. 1964), the Court of Appeals of Kentucky reversed a conviction for murder because the trial court failed to give an instruction on voluntary manslaughter in circumstances where there was no evidence of malice. In that case the defendant shot the deceased, a friend whom she had been dating, six times with her own pistol causing his death. The defendant testified that the deceased was working on a television set and had placed the pistol

on top of it, that the defendant picked up the pistol to look at it, that the deceased grabbed the defendant for no reason, and that the pistol went off accidentally. In reversing the judgment, the court stated, 380 S.W.2d at 72:

> This was an unusual occurrence. Between the parties there existed a close and friendly relationship. If we do not believe appellant's story, the reason for this killing is obscure. Nothing indicates malice prior to the time the parties occupied the motel room. (They had been there about 2-1/2 hours.) It is conceivable that appellant for some reason decided to kill Taylor. An equally supportable theory is that under the influence of drink the parties took a sudden aversion to each other, that some sort of affray ensued, and the gun was fired in sudden heat and passion. . . .
>
> If appellant was guilty, we do not believe the evidence points so clearly to the crime of murder as to exclude another reasonable inference that a lesser crime was committed.

Finally, in State v. Thomas, 147 Mt. 325, 413 P.2d 315 (1966), where defendants husband and wife were convicted of second degree murder in the killing of defendant wife's brother, the Supreme Court of Montana affirmed the trial court's order granting new trials on the ground that error was committed in the trial court's refusal to charge on manslaughter. The court noted that the wife's testimony that she loved her brother and bore him no ill feeling placed the existence of malice in issue because it tended to eliminate or negative the presence of malice.

The principle relied upon in the three cases described above is applicable here. The absence of evidence of a reason for appellant intentionally and unjustifiably killing the deceased and the absence of a clear showing of ill-will suggest that appellant acted without malice. Under such circumstances the trial court should have given instructions on manslaughter on its own motion.

This Court has held that plain error was committed where a trial court failed to give instructions on manslaughter. Thomas v. United States, 136 U.S.App.D.C. 222, 419 F.2d 1203 (1969); see McDonald v. United States, 109 U.S.App.D.C. 98, 284 F.2d 232 (1960); Kinard v. United States, 68 App.D.C. 250, 96 F.2d 522 (1938); Fed. R. Crim. P. 52(b). The rule has been recognized in other jurisdictions. In Parker v. State, 218 Ga. 654, 129 S.E.2d 850, 854 (1963), the court stated:

> . . . [T]he decisions hold that where "under one phase of the evidence, the law of voluntary manslaughter was involved in the case, the judge errs when he omits to charge upon that subject . . . and that this charge is required even without any request.

See People v. Cooper, 73 Cal. Rptr. 608 (Ct.App., 2d Dist. 1968) (involving a conviction for assault with a deadly weapon where the court stated, 73 Cal. Rptr. at 611: ". . . a proper application of the doctrine of stare decisis requires us to hold that the trial court

must instruct upon included offenses, without a request, when the evidence calls for it."); People v. Aubrey, 61 Cal. Rptr. 772 (Ct.App. 2d Dist. 1967) (involving a conviction for first degree murder which was reversed because of the failure of the trial court to instruct on its own motion on voluntary manslaughter because of diminished responsibility); State v. Lilley, 3 N.C.App. 276, 164 S.E.2d 498 (Ct.App. 1968); Lee v. Commonwealth, 329 S.W.2d 57 (Ky. 1959) (dictum).

There may be cases where a court's failure to instruct on a lesser included offense would not be plain error but would be reversible error if instructions had been requested by defense counsel. If so, this is not such a case. The absence of any evidence of appellant's motive for killing the deceased, the inconclusive evidence of ill-will, and the lack of any eye-witnesses to the killing, when considered together with the evidence, clearly indicate that manslaughter, not murder, might be the crime for which appellant should be found guilty. In its failure to consider all of the evidence, and the lack thereof, in relation to the elements of second degree murder, the trial court committed plain error.

III. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON THE ELEMENTS OF MURDER BY FAILING TO MAKE CLEAR THAT A WRONGFUL ACT INTENTIONALLY DONE IS NOT NECESSARILY DONE WITH MALICE

The trial court instructed the jury on the elements of first degree murder, second degree murder, and carrying a dangerous weapon. In its explanation of malice as an element of second degree murder, the court correctly charged the jury. However, in its instructions on first degree murder, the court defined malice erroneously. Substantial rights of appellant may have been jeopardized by the confusion created by the differing explanations of malice.

In charging the jury on first degree murder, the trial court equated a wrongful act intentionally done as one done with malice, stating (Tr. III, 273-274):

> In determining whether a wrongful act is intentionally done or is therefore done of malice aforethought, you should again bear in mind that it may be inferred that every man intends the natural and probable consequences of his own act but you are not required to so infer.

The language of this instruction has been held to be erroneous, and reversal has been required even when defense counsel failed to object to the instruction. United States v. Wharton, ___ U.S.App.D.C. ___, 433 F.2d 451 (1970). As stated in Green v. United States, 132 U.S.App.D.C. 98, 100, 405 F.2d 1368, 1370 (1968) (footnote omitted) ("Green I"):

> A wrongful act intentionally done is not therefore done with malice. Omitted from this definition of malice is the element of wilfulness, which the court elsewhere included in its definition of malice, or that the intentionally done wrongful act was without justification or excuse.

The test of whether the erroneous charge warrants reversal is "the probable impact, appraised realistically, of the particular instructional mistakes upon the jury's fact finding function." United States v. Wharton, supra, ___ U.S.App.D.C. at ___, 433 F.2d at 457. In concluding that reversal was necessary because the instructional error might have affected the jury's verdict, the Court in Wharton made a twofold examination: first, the deficient charge was weighed in relation to related segments of the charge; second, the evidence of malice was analyzed to see whether proof of malice was such that the conviction could stand.

Applying the first test to the instant case, it is clear that other portions of the instructions compounded the error. The trial court defined malice as follows (Tr. III, 273):

> We come then to the third element, that is, that the defendant acted with malice. Now, malice in its ordinary use in everyday life would indicate a feeling of hatred or ill-will toward another or a feeling of hostility toward another person. In its legal sense, however, "malice" has a broader significance. It is a state of mind showing a heart regardless of social duty, a mind deliberately bent on mischief, a generally depraved, wicked, and malicious

> spirit. "Malice" as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

Essentially, the court was following the language of Standard Criminal Jury Instruction No. 83, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA at 62 (Junior Bar Section, The Bar Association of the District of Columbia, 1966). In United States v. Bush, 135 U.S. App.D.C. 67, 70, 416 F.2d 823, 826 (1969), this Court stated that ". . . it would be well in future cases to eliminate the implication in the standard charge that any violation of 'social duty' or 'duty,' even though not dangerous to life or limb, may be equated to malice." See also United States v. Lumpkins, No. 23,503 (D.C.Cir. Dec. 23, 1970) (where the Court noted the same deficiency but declined to reverse because the Bush decision had issued after the trial was concluded). In Carter v. United States, No. 21,591 (D.C.Cir. Dec. 8, 1970), error was claimed in that Instruction No. 83 implied that a wrongful act was done with malice if done only willfully. The Court refused to reverse the conviction. However, recognizing that "Instruction 83, in distinguishing malice from mere purposefulness, is less than luminously clear," (slip opinion at 10), the Court stated that the definition of malice suggested in Bush

should be used in all instructions given after Bush in order to avoid a claim of reversible error. Carter v. United States, supra, (slip opinion at 11).

Thus, in two segments of the instructions on malice the trial court failed to make clear that a wrongful act done willfully or intentionally does not necessarily mean that the act was done with malice. This error was repeated in the portion of the trial court's charge relating to a permissible inference of malice from the use of a deadly weapon. The trial court instructed the jury as follows (Tr. III, 274):

> If, in a prosecution for homicide, such as we have here, it is shown that the accused used a deadly weapon in the commission of the homicide, malice may be inferred from the use of such a weapon but you are not required to so infer.

Here, the trial court should have followed the language contained in Standard Criminal Jury Instruction No. 83:

> If a person uses a deadly weapon in killing another, malice may be inferred from his use of such weapon, in the absence of explanatory or mitigating circumstances. You are not required to infer malice from the use of such weapon, but you may do so if you deem it appropriate.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, supra, at 63 (emphasis added). By failing to indicate that a deadly weapon might be used in circumstances where malice was not present, the trial court furthered the impression that a wrongful act done intentionally or willfully must be done with malice.

All of the instructions discussed above were part of the trial court's charge on first degree murder. In charging on malice in the context of second degree murder, the court correctly followed the charge suggested in Bush and Carter.[5/] However, the trial court was not purporting to define malice differently for the degrees of murder. It repeatedly referred back to its earlier definition and noted, with an exception not here pertinent, that malice had been defined in almost exactly the same terms as used in the definition of first degree murder (Tr. III, 277). It would be unreasonable to assume that the jury considered only the malice instructions contained in the charge on second degree murder

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5/ The trial court's instruction was as follows (Tr. III, 276-277):

> As to the second element, let me go back again over what constitutes malice. As I said before, malice in the legal sense does not necessarily imply ill will, spite, hatred, or hostility toward the person killed.
>
> Malice is a state of mind showing a heart regardless of the life and safety of others, a mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit.
>
> It is also defined as the condition of mind which prompts a person to do willfully that is, on purpose, without adequate provocation, justification, or excuse, a wrongful act whose foreseeable consequence is death or serious bodily injury to another.

in convicting appellant of that crime. Further, the likelihood for confusion was enhanced as a result of the jury's request, after it had commenced its deliberations, for a further explanation of the differences in the degrees of murder. The trial court repeated the instructions given earlier except for a charge relating to an inference of malice from wanton and reckless conduct (Tr. IV, 291-296). Thus, all of the deficiencies in the instructions were repeated a second time. Under such circumstances it would be unrealistic to say that the correct instructions on malice in the charge relating to second degree murder cured the numerous deficiencies in the instructions pertaining to malice in the charge relating to first degree murder. As this Court noted in Wharton, supra, ". . . we cannot know whether the jury were guided by the correct or the incorrect portions of the instructions." ___ U.S.App.D.C. at ___, n. 47, 433 F.2d at 457, n. 47.

This case is similar to Wharton, supra, where there were two deficient instructions, both of which were later reread to the jury. The recent cases of Mitchell v. United States, No. 22,052 (D.C.Cir. May 13, 1970), and United States v. Green, 137 U.S.App.D.C. 424, 424 F.2d 912 (1970) ("Green II") (involving the same appellant as in Green I upon his conviction following a new trial), are distinguishable from the instant case. In both

Mitchell and Green II, the trial courts included in the instructions on malice the statement substantially as follows: "[i]n determining whether a wrongful act is intentionally done and, therefore, done with malice aforethought. . . ." On appeal the convictions were affirmed. In Green II, the Court noted that the objectionable language occurred after a proper instruction on malice which made it clear that lack of justification or excuse was essential to malice. The Court concluded that considering the charge as a whole, it was inconceivable that the jury would have found deliberation and premeditation without also finding malice. In Mitchell, the Court noted that the cumulative effect of two erroneous instructions was absent and simply concluded that the objectionable language, following a correct definition of malice, did not constitute plain error.

The erroneous instructions discussed above could have been determinative factors in the jury's returning a verdict of guilty of second degree murder against appellant. Once it had concluded that appellant killed the deceased, the critical issue for the jury to decide was whether appellant acted with malice. As noted in Part I, supra, positive evidence of malice in the instant case is minimal. Having rejected the Government's contention that appellant acted with premeditation and deliberation, the jury was left to speculate as to the

motive for the killing and to the events which precipitated the killing. If properly instructed, the jury could have decided that there was insufficient evidence to establish beyond a reasonable doubt that appellant acted with malice. As more fully set forth in Part II, supra, the jury might have concluded that appellant shot the deceased in fear of bodily injury because of some aggressive act of the deceased. But if the jury had so concluded, it might still have convicted appellant of murder under the mistaken belief that if appellant had intentionally shot the deceased he would have acted with malice regardless of whether he acted with justification or excuse. As in Wharton, it cannot be said ". . . with fair assurance that the verdict was not swayed by the judge's instructional errors." United States v. Wharton, supra, ___ U.S.App.D.C. at ___, 433 F.2d at 461.

That appellant's trial counsel did not put before the jury a theory of the case consonant with manslaughter is not a reason for dismissing the error. The ground upon which appellant elected to defend, i.e., that he did not shoot the deceased, cannot be a basis for dispensing with malice as an element of murder. Although the jury could have inferred malice from the use of a deadly weapon, the trial court should not have compelled that conclusion by eliminating, in effect, the jury's consideration of circumstances which would lead to a

finding of lack of malice. The absence of an articulated theory of a killing under mitigating circumstances does not mean that the prejudice of the erroneous instructions was any less. It is significant only in that the jury, if it found an absence of malice, could not have returned a verdict of guilty of a lesser included offense, but would have been required to find appellant not guilty of all offenses relating to the homicide.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's judgment of conviction for murder in the second degree.

Respectfully submitted,

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April 26, 1971

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April 26, 1971

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1120

UNITED STATES OF AMERICA, APPELLEE

v.

THOMAS B. JOHNSON, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DAVID G. LARIMER,
Assistant United States Attorneys.

Cr. No. 1258-70

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was there sufficient evidence of murder in the first degree to submit the case to the jury?

II. In light of the evidence developed at trial, should the trial court have given, without request, a lesser included offense instruction on manslaughter?

III. Should appellant's conviction for second-degree murder be reversed where the trial court properly instructed the jury on all the elements of second-degree murder, including the element of malice, but where it may have erred in its malice instruction in charging the jury on first-degree murder?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

v.

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in an indictment filed July 22, 1970, with murder in the first degree[1] and carrying a pistol without a license.[2] Jury trial commenced on November 12, 1970, before the Honorable Howard F. Corcoran. The jury returned a verdict of guilty of murder in the second degree and carrying a pistol without a license. Appellant was sentenced on January 27, 1971, to five to twenty years for second-degree murder and one

[1] 22 D.C. Code § 2401.

[2] 22 D.C. Code § 3204.

year for carrying a pistol without a license, to run concurrently. This appeal followed.

On Saturday afternoon, May 30, 1970, Memorial Day, John H. Duvall, known as "Long John" (Tr. 73, 116, 135, 165), died of a gunshot wound in the head (Tr. 16). The immediate cause of death was a .32 caliber bullet fired from a revolver (Tr. 23, 26). During that Memorial Day, and for some time prior to that, Duvall maintained an upstairs apartment at 1110½ U Street, N.W., as a game room where various card and dice games could be played (Tr. 49, 77, 138).

William O. Laney, who had known both appellant and the victim for ten years (Tr. 134-135), was among those present in Duvall's apartment at 1110½ U Street when the shooting occurred and for several hours preceding it. Laney arrived between 10:30 and 11:00 a.m. and participated, on and off, in the various dice and card games until the shooting (Tr. 137-138), which occurred sometime after 3:00 p.m. (Tr. 121). He testified that he and several other players lost between $60 and $100 to Duvall at cards. Besides himself, appellant and Duvall, there were at least five other participants (Tr. 137). After the card game Laney watched Duvall beat appellant in a dice game which lasted over an hour (Tr. 137-140). As Duvall was counting his winnings—estimated at about $100 (Tr. 141)—appellant suddenly reached across the table and snatched the money out of Duvall's hands, then abruptly departed, leaving a "stunned" Duvall (Tr. 141). About fifteen minutes later (Tr. 146) Laney saw Duvall answer a knock at the door (Tr. 142). He heard someone saying, "You don't believe I'll shoot, do you?" (Tr. 142), and then heard two shots. He thought the voice sounded like appellant's (Tr. 142), but at trial he was not positive (Tr. 151). He heard someone hurrying away from the door down the stairs (Tr. 142). He then discovered Duvall dead, draped over the bathtub, and went and called the police.

Calvin Stoddard arrived at Duvall's apartment after appellant had snatched the money and left. He met Duvall

standing at the top of the stairs (Tr. 123). After three or four minutes (Tr. 124) he heard someone talking with Duvall in the hall. He heard Duvall say, "That's mine" (Tr. 124), and then he heard two shots. Because of their location in the game room, neither Stoddard nor Laney saw the killer (Tr. 56, 132, 149). Stoddard observed Duvall dead, however, and went with Laney to call the police (Tr. 126). After making the call, both Stoddard (Tr. 121-122) and Laney (Tr. 146) noticed that appellant's car, which had been parked earlier on 12th Street—just around the corner from Duvall's apartment (Tr. 121-122) —was gone (Tr. 127).

John E. Scott and Rollins B. Moody, both of whom had known appellant and the victim for several years (Tr. 72-73, 165), were present at the moment when appellant grabbed the money from Duvall's hands but not at the shooting itself (Tr. 81, 170). Both testified that Duvall and appellant had been playing dice and that Duvall was a big winner. Scott estimated that Duvall had about $200 in his hands when appellant snatched the money (Tr. 170). Moody left the apartment shortly after appellant and returned some time later with two policemen to discover Duvall's body (Tr. 86).

John E. Scott left Duvall's apartment three or four minutes after appellant left following the taking of the money (Tr. 170). He followed appellant to his car and asked to borrow some money. Appellant refused, saying that "he was short, he had some bills" (Tr. 171-172). Appellant was standing at the trunk of his car on 12th Street—just around the corner from Duvall's apartment —loading a small revolver (Tr. 172). Scott saw appellant load the gun, put it in his pocket, go up 12th Street and turn towards Duvall's residence on U Street (Tr. 173-174). About ten or fifteen minutes later he saw appellant walking through a parking lot behind Duvall's apartment toward his car, still parked on 12th Street (Tr. 174). Appellant said to Scott, "Everything is all right," got in his car and drove away (Tr. 175). Immediately after this Scott heard some rumors on the street

concerning Duvall (Tr. 175), went to Duvall's apartment and found him dead (Tr. 177). Scott looked in Duvall's wallet in an attempt to locate Duvall's wife's phone number, but the wallet was empty (Tr. 178, 186). Detective James F. Turner also testified that when he arrived Duvall's wallet was empty, and that no money was found on the victim except seventy-one cents (Tr. 104-105).

Appellant took the stand and admitted that he and Duvall did the majority of the gambling (Tr. 216) and that he had grabbed what he estimated to be $90 from Duvall after Duvall refused to lend him money (Tr. 212). Appellant said he immediately left the apartment after the snatching and went either to the poolroom downstairs or to the liquor store on the corner (Tr. 212), then got into his car and drove home (Tr. 212-213).

When the court was considering instructions, the following brief discussion occurred:

> THE COURT: . . . As the evidence lines up now, I cannot see going to the jury on anything except first degree and second degree murder.
>
> MR. J. MURRAY [counsel for appellant]: The defense would agree.
>
> THE COURT: I think manslaughter is out.
>
> MR. B. MURRAY [also counsel for appellant]: We cannot suggest any basis for a manslaughter charge. (Tr. 222.)

In its instruction on malice in its charge on first-degree murder, the court said in part:

> We come then to the third element, that is, that the defendant acted with malice. Now malice in its ordinary use in everyday life would indicate a feeling of hatred or ill-will toward another or a feeling of hostility toward another person. In its legal sense, however, "malice" has a broader significance. *It is a state of mind showing a heart regardless of social duty*, a mind deliberately bent on mischief, a generally depraved, wicked, and malicious spirit. "Malice," as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrong-

ful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

Malice may be either express or implied. Express malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose, without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act.

In determining whether a wrongful act is intentionally done or is therefore done of malice aforethought, you should again bear in mind that it may be inferred that every man intends the natural and probable consequences of his own act but you are not required to so infer. As I have already told you, the intent may be deduced from all of the surrounding circumstances. (Tr. 273-274) (emphasis added).

In instructing on murder in the second-degree, however, neither of the italicized phrases was included in the instruction on malice (Tr. 276-277). Counsel did not object to these instructions or suggest any additions (Tr. 283). The court's instruction on murder in the first and second degree was read back to the jury at their request during their deliberations (Tr. 289).

ARGUMENT

I. There was sufficient evidence of all the elements of murder to submit the case to the jury on that charge.

(Tr. 71-194)

Appellant argues that at the close of the Government's case there was insufficient evidence of murder to submit the case to the jury. His argument is without merit under the applicable law.[3]

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[3] *United States* v. *Hardin*, D.C. Cir. No. 22,683, decided December 22, 1970, slip op. at 3; *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt. On the contrary, where there are divergent hypotheses, one of guilt and one of innocence, and there is evidence to support each, then the jury must be given an opportunity to choose between them. If either of two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter, giving them the right to determine credibility, weigh the evidence and draw justifiable inferences from established facts. Were the rule otherwise, the Government would be required to prove its case beyond a reasonable doubt to the judge, a result which would relegate the jury to the "very low grade function of secondary fact finders." [4]

The evidence here showed that appellant and the victim had been the principal participants (Tr. 169, 217) in an afternoon of gambling and card-playing. There was uncontradicted testimony that the victim was the consistent winner (Tr. 79, 138, 169). One of the onlookers estimated his winnings at $200 (Tr. 170), and all agreed that appellant was the primary loser (Tr. 79, 138-139, 169, 218). There had been some drinking on that warm Memorial Day by appellant and some of the other participants (Tr. 148-149, 214). An indication of appellant's rage at losing was his snatching of a large amount of the day's winnings from the hands of the victim (Tr. 81, 141, 170, 212). After that appellant abruptly left the apartment and proceeded to his car, where he was seen loading a small pistol (Tr. 172). Appellant then pocketed the pistol and proceeded back in the direction of the victim's apartment (Tr. 172-174). At about this time, someone with a voice which sounded like appellant's (Tr. 142) was heard conversing with the victim outside the door, saying, "You don't believe I'll shoot, do you?" (Tr. 142). The witness who heard the conversation had known appellant for ten years (Tr.

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[4] *Crawford* v. *United States*, *supra* note 3, 126 U.S. App. D.C. at 158, 375 F.2d at 334.

134). The victim was then shot and killed. Shortly after the shooting, John Scott saw appellant coming through the parking lot at the rear of the victim's house, muttering that "everything is all right" (Tr. 174-175). Clearly there was sufficient evidence of all the elements of murder in the first degree to submit the case to the jury.

The fact that the Government's case rested, in part, on circumstantial evidence is of on significant import.[5] It is well recognized, of course, that circumstantial evidence is not an inferior type of evidence and is no different from direct testimonial evidence.[6] As the Supreme court has remarked, "[D]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[7] Appellant also decries the Government's failure to establish a motive. In claiming this, appellant overlooks the unchallenged testimony that just prior to the killing appellant was beaten badly at dice by the victim and was so upset at his losing and at the victim's refusal to lend him money that he grabbed the victim's winnings and left. In any event, it is well settled that the Government is not required to prove motive.[8] Based on all the evidence, there certainly was "a basis for reasonable inference"[9] that appellant shot John H. Duvall with malice aforethought.

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[5] *See United States* v. *Harris*, 140 U.S. App. D.C. 270, 284-286, 435 F.2d 74, 88-90 (1970).

[6] *Holland* v. *United States*, 348 U.S. 121, 140 (1954).

[7] *Micholic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

[8] *Lanckton* v. *United States*, 18 App. D.C. 348, 368 (1901). *See also Hotema* v. *United States*, 186 U.S. 413, 414 (1902).

[9] *United States* v. *Lumpkins*, —— U.S. App. D.C. ——, ——, 439 F.2d 494, 496 (1970).

II. In light of the evidence, the trial court acted quite properly in not instructing the jury on manslaughter.

(Tr. 71-194, 222)

Appellant contends that the trial court should have instructed the jury *sua sponte* on the elements of manslaughter. Rule 31 (c), FED. R. CRIM. P., provides that a defendant "may be found guilty of an offense necessarily included in the offense charged . . . ." As the Supreme Court has stated:

> In a case where some elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it, would no doubt be entitled to an instruction which would permit a finding of guilt on the lesser offense.[10]

In determining whether a lesser included offense instruction should be given, this Court in *United States* v. *Whitaker*[11] has recently enumerated five conditions which must ordinarily be met. First, a proper request must be made. Second, the elements of the lesser offense must be identical to part of the elements of the greater offense. Third, there must be some evidence which would justify conviction of the lesser offense. Fourth, the proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser. Fifth, the principle of mutuality—*i.e.*, that if proper the charge may be demanded by either prosecution or defense—must generally apply. The Government does not contest fulfillment of the second and fifth requirements in this case.[12] However, the Govern-

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[10] *Berra* v. *United States*, 351 U.S. 131, 134 (1956); *see Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965).

[11] D.C. Cir. No. 23,185, decided May 26, 1971, slip op. at 5.

[12] Manslaughter has long been recognized as a lesser included offense of murder. *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Comer* v. *United States*, 137 U.S. App. D.C. 214, 218, 421 F.2d 1149, 1153 (1970); *Belton* v. *United States*, 127 U.S. App. D.C. 201, 206, 382 F.2d 150, 155 (1967). Clearly, other conditions being met, both

ment does maintain that the remaining three conditions set out in *Whitaker* have not been satisfied here.

A. *There was no request for a manslaughter instruction.*

There was no request for an instruction on manslaughter. In fact, counsel specifically stated that they could suggest no basis for the manslaughter instruction (Tr. 222). This Court has expressly cautioned that the trial court should not give a lesser included offense instruction unless it is specifically requested by one of the parties.[13] This Court has also recognized that an appellant faces a heavy burden in objecting to instructions on appeal in which he acquiesced at trial.[14] This Court has often stressed defense counsel's obligation to indicate specifically to the trial court which testimony he relies on for a lesser included offense instruction.[15] In the *Belton* case this Court said:

> [W]e cannot assign reversible error to the failure of the trial court to glean and array on its own motion the strained possibilities of events put forward by counsel who have mulled over the appeal, but not advanced at trial either by defense counsel or the witnesses.[16]

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the Government and appellant could have requested the instruction under the principle of mutuality. *See Fuller* v. *United States*, 132 U.S. App. D.C. 264, 294-295, 407 F.2d 1199, 1229-1230 (1968) (*en banc*), *cert. denied*, 393 U.S. 1120 (1969); *cf. United States* v. *Whitaker*, *supra* note 11, slip op. at 11-16.

[13] *Walker* v. *United States*, 135 U.S. App. D.C. 280, 283, 418 F.2d 1116, 1119 (1969).

[14] *E.g.*, *United States* v. *Howard*, 139 U.S. App. D.C. 347, 350-351, 433 F.2d 505, 508-509 (1970); *United States* v. *Dixon*, 135 U.S. App. D.C. 401, 403, 419 F.2d 288, 290 (1969); *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 45, 361 F.2d 61, 62 (1966); FED. R. CRIM. P. 30.

[15] *Young* v. *United States*, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); *see United States* v. *Lumpkins*, *supra* note 9, —— U.S. App. D.C. at ——, 439 F.2d at 496.

[16] *Belton* v. *United States*, *supra* note 12, 127 U.S. App. D.C. at 207, 382 F.2d at 156.

B. *There was absolutely no evidence in the case upon which a conviction for manslaughter could rest.*

As to the third criterion set out in *Whitaker* that is, whether there is some evidence which would justify conviction of the lesser included offense, we submit that there is no evidence whatsoever bearing on manslaughter in this case. The case being devoid of any evidence to support a manslaughter conviction, the trial court was precluded from instructing on that offense even had there been a request. As early as *Sparf* v. *United States*,[17] the Supreme Court indicated that, where the defendant is charged with murder, there must be some evidence to sustain a conviction for manslaughter before the jury may be so instructed. In refusing to reverse a murder conviction for failure to give the manslaughter instruction, the Court observed:

> A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.[18]

This Court also has uniformly held that a defendant is entitled to instructions on a lesser included offense of manslaughter only where there is evidence in the record to support a finding of guilt of that offense.[19]

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[17] 156 U.S. 51 (1895).

[18] *Id.* at 63-64.

[19] *Comer* v. *United States*, *supra* note 12, 137 U.S. App. D.C. at 218, 421 F.2d at 1153; *Belton* v. *United States*, *supra* note 12, 127 U.S. App. D.C. at 206, 382 F.2d at 155; *Austin* v. *United States*, 127 U.S. App. D.C. 180, 188, 382 F.2d 129, 137 (1967).

Manslaughter is the wilful and unlawful killing of another on sudden quarrel or in the heat of passion, following some provocation by the victim such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection.[20] If there is no evidence in the record to support a conviction for manslaughter, then the judge clearly has an obligation not to instruct the jury on that offense. As pointed out most recently in *United States* v. *Sinclair*,[21] if there is no rational basis for instructing on a lesser offense, such an instruction becomes

> merely a device for the defendant to invoke the mercy-dispensing prerogative of the jury; and that is not by itself a permissible basis to require a lesser-included offense instruction. . . . [T]he judge is not required to put the case to the jury on a basis that essentially indulges and even encourages speculations as to bizarre reconstruction.[22]

In *Austin* v. *United States*,[23] the deceased was last seen in the defendant's truck at 4:30 a.m. About thirty minutes later her mutilated body was found in the river, a short distance from where the defendant had been seen by two police officers hurriedly departing. This Court stated:

> The court did not give an instruction on manslaughter, but none was requested. An unlawful killing in the sudden heat of passion—whether produced by rage, resentment, anger, terror or fear—is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to

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[20] *Bishop* v. *United States*, 71 App. D.C. 132, 136-137, 107 F.2d 297, 302-303 (1939).

[21] D.C. Cir. No. 23,178, decided March 31, 1971.

[22] *Id.*, slip op. at 4; *see United States* v. *Whitaker*, *supra* note 11, slip op. at 9; *Kelly* v. *United States*, 125 U.S. App. D.C. 205, 207, 370 F.2d 227, 229 (1966), *cert. denied*, 388 U.S. 913 (1967).

[23] *Supra* note 19.

> lose self-control and commit the act on impulse and without reflection. *There is no contention before us of adequate provocation, and so appellant's crime is murder.* The issue is, what degree of murder.[24]

Likewise, in *Belton* v. *United States*,[25] the defendant walked into the bedroom of his former wife, questioned her about her drinking, pulled a pistol and began firing. He claimed that the gun went off while he was struggling with his wife and said that he left his wife uninjured. In upholding the trial court's denial of a manslaughter instruction, this Court found that there was "no testimony 'fairly tending' to bear on manslaughter." [26]

> The evidence was not sufficient to permit a reasonable juror to find beyond a reasonable doubt that there had been a killing by defendant in a sudden quarrel, or in the heat of passion, following provocation by the deceased.[27]

The Government submits that there is no evidence to support a manslaughter conviction in this case. There was no proof whatsoever that there was a quarrel or any provocation by the victim. The witnesses were unanimous in characterizing Duvall as being calm after appellant snatched his winnings (Tr. 81, 141, 170). He showed no emotion except that he appeared "stunned" (Tr. 141). He made no overture, physical or verbal, to get his money back (Tr. 141, 170). The very brief conversation which took place at the door just before Duvall's murder could never constitute sufficient provocation to reduce a homicide to manslaughter, for "mere words alone do not excuse even a simple assault." [28] Even

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[24] 127 U.S. App. D.C. at 188, 382 F.2d at 137 (emphasis added and citations omitted).

[25] *Supra* note 12.

[26] 127 U.S. App. D.C. at 207, 382 F.2d at 156.

[27] *Id.*

[28] *Allen* v. *United States*, 164 U.S. 492, 497 (1896).

if a word or two passed between appellant and his victim, they could never amount to sufficient provocation to reduce murder to manslaughter.

Moreover, appellant's testimony was that he never returned to Duvall's apartment after the snatching of the money. His testimony, if believed, placed him at home, or on the way home, when the killing took place. As recently pointed out by this Court:

> [T]he refusal to give the lesser-included offense instruction is not error when defendant's testimony is *completely exculpatory* and, if believed, could only lead to acquittal, and the kind of reconstruction of events needed to support a lesser charge is neither fairly inferable from the testimony nor pointed out by trial counsel.[29]

C. *There was no substantial factual dispute over the element of malice which differentiates murder from manslaughter.*

Furthermore, there can be no contention that the element differentiating murder from manslaughter—malice—was "sufficiently in dispute" as to warrant conviction of the latter rather than the former. The central issue before the jury was not whether appellant killed Duvall with malice but whether he killed him at all. The identity of the gunman outside Duvall's apartment was the only real fact at issue. The entire defense theory was that appellant was nowhere near the scene when the killing took place. This case is not one where a crucial issue is whether the defendant killed in the heat of passion or killed with malice.[30] Assuming the jury determined the killer to be appellant, the evidence of malice is

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[29] *United States* v. *Sinclair*, *supra* note 21, slip op. at 3 (emphasis added).

[30] *See Carter* v. *United States*, —— U.S. App. D.C. ——, 437 F.2d 692 (1970), *cert. denied*, 402 U.S. 912 (1971); *Mitchell* v. *United States*, 140 U.S. App. D.C. 209, 434 F.2d 483, *cert. denied*, 400 U.S. 867 (1970); *United States* v. *Wharton*, 139 U.S. App. D.C. 293, 433 F.2d 451 (1970); *Green* v. *United States* [*Green I*], 132 U.S. App. D.C. 98, 405 F.2d 1368 (1968).

so substantial that the jury could not have been confused or in doubt as to that issue.[31]

III. The court's instruction on malice in its first-degree murder charge, to which appellant did not object, does not warrant reversal of appellant's conviction for second-degree murder when a proper instruction on malice was given in the second-degree murder charge.

(Tr. 273-283)

Appellant concedes[32] that the court's instructions on murder in the second degree were without error. Appellant, however, would have this court reverse his conviction for second-degree murder because of an allegedly erroneous instruction on an element of a crime, murder in the first degree, of which he was *not* convicted. Appellant contends that though the court properly instructed the jury on malice in its second-degree murder charge, the allegedly erroneous instruction on malice in the first-degree murder charge somehow confused the jury and rendered their unanimous verdict suspect. Appellant's contentions are speculative at best. The trial court in its instructions on malice in the second-degree murder charge used the exact language recommended by this Court in *United States* v. *Bush*[33] and reaffirmed in *Carter* v. *United States*.[34] The jury convicted appellant of second-degree murder, having had the benefit of a completely error-free instruction on that offense.

In defining the element of malice in its first-degree murder charge, the court stated:

> In determining whether a wrongful act is intentionally done *or* is therefore done of malice aforethought . . . . (Tr. 273-274) (emphasis added).

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[31] *See United States* v. *Wharton*, *supra* note 30, 139 U.S. App. D.C. at 300, 433 F.2d at 458.

[32] Appellant's Brief at 30.

[33] 135 U.S. App. D.C. 67, 416 F.2d 823 (1969).

[34] *Supra* note 30.

This court twice recently has ruled that an instruction containing language which tended to equate an act intentionally done with an act done with malice constituted error.[35] In those cases the objectionable phrase was:

> In determining whether a wrongful act is intentionally done and is therefore, done with malice aforethought . . . .[36]

In this case the court inserted the word "or" in lieu of "and" between the phrases "intentionally done" and "done with malice." Appellant claims that the allegedly erroneous instruction equating an intentional act with one done with malice was somehow compounded by the court's instruction that

> malice is a state of mind showing a heart regardless of social duty . . . (Tr. 273).

Though ruling that this language equating malice with a violation of a social duty, even though not dangerous to life and limb, should be eliminated in the future, the court in *United States* v. *Bush*[37] specifically found that there was no prejudicial error requiring reversal in giving that charge. *Carter* v. *United States*,[38] which reemphasized the *Bush* rule, was decided subsequent to appellant's trial. In any event, the court here cured any possible confusion when its malice instruction in its charge on second-degree murder exactly mirrored the language suggested by *Bush* and *Carter*.

Although *Green I* and *Wharton* reversed convictions where an instruction equated malice to an intentional act, there were other serious errors in the instructions on malice, the *combination* of which required reversal.

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[35] *United States* v. *Wharton*, *supra* note 30; *Green I*, *supra* note 30.

[36] *United States* v. *Wharton*, *supra* note 30, 139 U.S. App. D.C. at 297, 433 F.2d at 455; *Green I*, *supra* note 30, 132 U.S. App. D.C. at 100, 405 F.2d at 1370.

[37] *Supra* note 33, 135 U.S. App. D.C. at 70, 416 F.2d 826.

[38] *Supra* note 30.

In both *Green I* and *Wharton*, the court had erroneously instructed that the law "infers" or "presumes" malice from the use of a deadly weapon. In *Belton* this Court had clearly established that the law does not automatically presume malice from the use of a deadly weapon, but only *permits* the jury to draw the inference of malice. The two instructional miscues were sufficient to cause the *Wharton* Court, like the *Green I* Court before it, to find plain error and reverse.

But the discussion did not end there. As *Wharton* itself noted in determining whether unobjected-to erroneous instructions constituted plain error:

> The inquiry . . . is the probable impact, appraised realistically, of the particular instructional mistakes upon the jury's fact finding function.[39]

This Court has also recently held, in two cases subsequent to *Wharton*, that an erroneous instruction equating malice with an intentional act did not automatically constitute reversible error. In *United States* v. *Green* [*Green II*],[40] this Court held that even though the same erroneous instruction was there given as had been given in *Green I*:

> In the absence of objection and under the circumstances of this case we do not find that the inclusion of the words "and is therefore done with malice aforethought" in the challenged instruction was plain error requiring reversal.[41]

In refusing to reverse, this Court noted that in *Green I* and *Wharton* there were two erroneous instructions given on malice. The *Green II* Court also noted that the objectionable language "appeared in the context of a careful and thorough exposition of the definition if malice

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[39] *United States* v. *Wharton*, *supra* note 30, 139 U.S. App. D.C. at 299, 433 F.2d at 457.

[40] 137 U.S. App. D.C. 424, 424 F.2d 912 (1970).

[41] *Id.* at 425, 424 F.2d at 913.

which made it plain that willfulness and lack of justification or excuse were essential elements of such a state of mind."[42] In *Mitchell* v. *United States*[43] the same objectionable charge was given, but the Court refused to reverse, following again the rationale of *Green II*.

In the circumstances of the instant case, therefore, the unobjected-to instruction on malice does not constitute error of a magnitude requiring reversal. The objectionable phrase—assuming, of course, that this Court construes the instruction here to be similar to the objectionable language found in *Green I*, *Green II*, *Wharton* and *Mitchell*—follows closely a correct definition of malice. It is followed by a correct definition when second-degree murder is defined. Given the entirely correct instruction on malice which followed in the court's instruction on second-degree murder, the jury could not possibly have been misled or confused into believing that an intentional act to kill another without more constitutes malice.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[42] *Id.*

[43] *Supra* note 32.

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REPLY BRIEF FOR APPELLANT THOMAS B. JOHNSON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1120

United States of America, Appellee

v.

Thomas B. Johnson, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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Of Counsel:

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888 17th Street, N. W.
Washington, D. C. 20006

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TABLE OF CASES

OTHER AUTHORITIES

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* Cases chiefly relied upon are marked by asterisks.

THE TRIAL COURT'S INSTRUCTIONS RELATING TO MALICE, TO THE EFFECT THAT A WRONGFUL ACT INTENTIONALLY DONE IS DONE WITH MALICE, MAY HAVE RESULTED IN THE JURY CONVICTING APPELLANT OF MURDER FOR CONDUCT CONSTITUTING MANSLAUGHTER SINCE THE JURY COULD HAVE BELIEVED THAT APPELLANT ACTED WITHOUT MALICE

The trial court's instructions relating to malice in its charge on first degree murder may be categorized as follows: first, a statement defining malice; [1] second, a statement distinguishing between express malice and implied malice; [2] third, a statement as to the permissible inference of an intent to cause the consequences of an act; [3]

1/ The trial court defined malice as follows (Tr. III, 273):

> In its legal sense, however, "malice" has a broader significance. It is a state of mind showing a heart regardless of social duty, a mind deliberately bent on mischief, a generally depraved, wicked, and malicious spirit. "Malice" as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

2/ The trial court's second instruction relating to malice was as follows (Tr. III, 273):

> Malice may be either express or implied. Express malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose, without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act.

3/ The trial court's third instruction relating to malice was as follows (Tr. III, 273-274):

> In determining whether a wrongful act is intentionally done or is therefore done of malice aforethought, you should again bear in mind that it may be inferred that every man intends the natural and probable consequences of his own act but you are not required to so infer. As I have already told you, the intent may be deduced from all of the surrounding circumstances.

and fourth, a statement as to the permissible inference of malice from the use of a deadly weapon. 4/ Substantially the same error was committed by the trial court in the first, third, and fourth instructions, i.e., a failure to make clear that an act done intentionally does not necessarily constitute an act done with malice.

In the first instruction, the definition of malice, the trial court stated (Tr. III, 273) (emphasis added):

> "Malice" as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

It is not clear whether the final phrase of this instruction--"without justification or excuse"--modifies only the last clause of the sentence or the first clause as well. If the latter only, then the first portion of the instruction equates a wrongful act willfully committed with an act done with malice. In Carter v. United States, ___ U.S.App.D.C. ___, 437 F.2d 692 (1970), where a substantially identical

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4/ The trial court's fourth instruction relating to malice was as follows (Tr. III, 274):

> The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. If, in a prosecution for homicide, such as we have here, it is shown that the accused used a deadly weapon in the commission of the homicide, malice may be inferred from the use of such a weapon but you are not required to so infer.

instruction was given, this Court commented on the failure of the instruction to clearly distinguish malice from mere purposefulness and suggested use of the definition of malice set forth in United States v. Bush, 135 U.S.App.D.C. 67, 416 F.2d 823 (1969), in all cases decided after Bush to avoid a claim of reversible error.

In the third instruction (see note 3 supra) the trial court again equated a wrongful act intentionally done with an act done with malice by introducing the instruction with the phrase: "In determining whether a wrongful act is intentionally done or is therefore done of malice aforethought . . . ." This language was condemned in United States v. Wharton, 139 U.S.App.D.C. 293, 433 F.2d 451 (1970), and in Green v. United States, 132 U.S.App.D.C. 98, 405 F.2d 1368 (1968), since malice would not exist if the wrongful act were done with excuse or justification.

Finally, the trial court concluded with the statement that malice could be inferred from use of a deadly weapon (see note 4 supra). By failing to state that malice may be inferred from such use only in the absence of explanatory or mitigating circumstances, see Standard Criminal Jury Instruction No. 83, 5/ the trial court again improperly equated a wrongful act, here using a deadly weapon, with an

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5/ CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA at 63 (Junior Bar Section, The Bar Association of the District of Columbia, 1966).

act done with malice.

The Government argues that the introductory phrase of the third instruction--"In determining whether a wrongful act is intentionally done or is therefore done of malice aforethought"--is to be distinguished from the language condemned in Wharton and Green because of the use of the disjunctive "or" instead of the conjunctive "and" between the words "intentionally done" and "therefore done of malice aforethought." However, the word "therefore," meaning "for that reason," 6/ used with the phrase "done of malice aforethought" indicates that the latter phrase relates back to "a wrongful act . . . intentionally done" and thus that malice is the conclusion to be derived from the intentional performance of a wrongful act. The Government also argues that any error in the third instruction would be cured by the fact that it was preceded by a correct definition of malice. However, as noted above, the definition of malice, which was set forth in the first instruction, was erroneous. The only instance where the trial court indicated in the first-degree murder charge that a wrongful act intentionally committed might not constitute an act done with malice was in the second instruction (see note 2 supra) where an example of implied malice was given as a "killing . . . caused by the intentional

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6/ Webster's New International Dictionary of the English Language, 2nd ed. (1946)

use of fatal force without circumstances serving to mitigate or justify the act." (Emphasis added.) Standing alone, this example could not correct the cumulative effect of substantially the same error made in three instructions.

The Government further contends that the correct instructions with respect to malice in the charge on second-degree murder would have prevented any misunderstanding on the jury's part. While these later instructions were correct, they were limited to a statement defining malice and a repetition of the second instruction in the first-degree murder charge distinguishing between express and implied malice. 7/ Thus, the subject matter of only the first two instructions in the charge on first-degree murder was dealt with in the second-degree murder charge. The limited nature of the second-degree murder instructions shows that such instructions were not intended to be considered apart from the prior instructions on malice. The jury would have continued to rely on the instructions relating to the inference of intent to cause the consequences of an act and the inference of malice from use of a deadly weapon. Since the subject matter of these two instructions was not given in the second-degree murder charge and since

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7/ The trial court included an additional instruction relating to the permissible inference of malice from reckless or wanton conduct. This instruction was eliminated when the trial court repeated the murder charges to the jury on the ground that it was not applicable to the case.

significant errors were made in such instructions, it would be unreasonable to view the second-degree murder instructions as curing the errors in the first-degree murder instructions.

Whether the trial court's instructional errors may have had any impact on the jury's verdict depends on whether malice was a significant issue. Although appellant's trial counsel did not raise the issue of manslaughter either by argument or by request for instructions, their failure to do so cannot be determinative, especially where, as here, instructions on manslaughter should have been given by the court on its own motion. Whether malice was a significant issue depends on whether the jury could have logically concluded that appellant acted without malice.

In finding appellant not guilty of first-degree murder but guilty of second-degree murder, the jury concluded that appellant killed the deceased, not with premeditation or deliberation, but on impulse or in sudden passion. See Austin v. United States, 127 U.S.App.D.C. 180, 188, 382 F.2d 129, 137 (1967). To so conclude the jury must have speculated as to the reasons for such passion or impulse. One plausible explanation is urged by the Government, i.e., that appellant killed the deceased because he was "upset at his losing and at the victim's refusal to lend him money," Brief for Appellee (typewritten copy) at 9, (also described as "appellant's rage at losing," Brief for Appellee at 8). However, the elapsed time of fifteen to twenty minutes between the grabbing of the money and the killing (Tr. II,

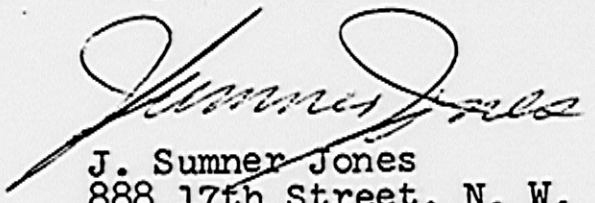
146) as well as the conversation occurring before the shooting are not entirely consistent with a killing in the heat of passion derived from the deceased's refusal to lend appellant money.

A more plausible explanation is that appellant became enraged because of a provocation occurring immediately prior to the shooting. This theory is in accord with the fact that some shouting was heard (Tr. II, 132) and the fact that the words overheard were consistent with an attempt by the deceased to get his money back. While the Government seeks to dismiss these facts with the principle that words standing alone cannot constitute adequate provocation, this assumes that all of the circumstances of the killing are known when in fact we have no knowledge of what acts or threatened acts may have occurred.

The jury may have considered either or both of the above explanations in concluding that appellant killed on impulse or in the heat of passion. If, in reaching its verdict, the jury relied solely on the explanation put forth by the Government, then manslaughter might be ruled out as a matter of law and malice would not be an issue of critical significance. But if it assumed that there was some provocation immediately prior to the killing, such provocation might have been sufficient to warrant a finding that appellant acted without malice and to reduce the crime from murder to manslaughter.

Malice, then, would have been a significant issue in the case, in which event the jury's verdict may have been swayed by the trial court's instructional errors.

Respectfully submitted,



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August 6, 1971